85-948 (1)

Supreme Court, U.S.
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CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

KOSCOT INTERPLANETARY, INC.

Petitioner,

vs.

BEACHLEY INVESTMENTS, N.V., a corporation, ANDRES JOVANOVIC and ALIDA NINO de JOVANOVIC

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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STANLEY JAY BARTEL, P.A.
2150 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
(305) 358-7177
November 29, 1985

Counsel for the Petitioner

37pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER A PARTY HOLDING A VESTED PROPERTY INTEREST IN PERSONAL PROPERTY MAY HAVE THAT PROPERTY RIGHT DIVESTED, MANY YEARS LATER, BASED UPON CONSTITUTIONALLY INADMISSIBLE EVIDENCE.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Koscot Interplanetary, Inc.,

Beachley Investments, N.V.

Andres Jovanovic

Alida Nino de Jovanovic

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OPINION BELOW

The Opinion of the lower court, appended hereto in its entirety, is not yet reported.

JURISDICTION

The Opinion of the Court of Appeals for the Eleventh Circuit affirming the District Court of the Middle District of Florida was entered on September 27, 1985. A timely Petition for Rehearing in the Court of Appeals was denied on October 29, 1985. Judgment was subsequently entered in the Court of Appeals on November 13, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254(1) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law;. . .

STATEMENT OF THE CASE

In the early 1970's KOSCOT acquired a warehouse in Central Florida. At the time it had no separate administrative or office facilities. It decided, therefore, almost immediately upon acquiring the warehouse property that it would install moveable parcitions in the warehouse to give it total flexibility in terms of arranging individual rooms within the warehouse property.

All of the testimony from individuals who participated in the initial installation and utilization of

the moveable partitions was to the effect that the partitions were installed on a "temporary" basis. In selecting moveable partitions KOSCOT "didn't want anything permanent". KOSCOT even used folding chairs because of an initial desire to be able to remove them expeditiously.

After the initial installation of moveable partitions, some of the partitions were taken out for installation into a new warehouse in Reno, Nevada. As the accounting department got bigger and as KOSCOT'S computer facility got larger, partitions were moved about. In the early years after installation, walls were taken out, moved and replaced with regularity.

KOSCOT'S engineer testified that after installation of the initial partitions, he relocated or redesigned individual offices about twice a month, moving the walls in the process.

The partitions were deliberately selected to be of a variety that was designed to be moveable. To coordinate with moveable partitions, electrical sockets in the wall were post-mounted by clips; ceiling panels above the wall partitions were of the replaceable, ceiling-panel variety; all of the demountable wall panels were pre-finished.

All KOSCOT personnel who ran the company or worked for it in the early

1970's uniformly testified that the architect for the premises had deliberately selected and recommended, and the company had deliberately installed, demountable partitions.

Not a single one of these witnesses testified at trial in the district court to any other intention.

There was no evidence introduced in the district court that at the time of initial installation of the disputed property the installer intended to annex the personal property to the freehold.

It was and is the position, therefore, of the within Petitioner in

this Court and in the courts below that as of the date of creation of the estate in issue in this case KOSCOT acquired vested rights to personal property; not real property.

There is nothing in the record in the district court to establish that in the initial financing of the warehouse building after the subject partitions had been installed that the loan documents included the moveable partitions within the schedule of assets covered by the warehouse's real estate mortgage. There was absolutely no testimony given in the district court by any one associated with the initial financing of the subject real estate, much less testimony tending to

show that the subject partitions were included within any financial statement which the initial lender relied upon; that they were listed in any of the applications or supporting financing documents for the initial loan or that they were ever a matter which the initial lender had ever considered much less relied upon.

In the late 1970's, KOSCOT ran into financial difficulties and its then real estate lender filed a foreclosure action on the KOSCOT warehouse. The trial judge in the foreclosure action [which was not the district court action below] appointed a receiver as part of ancillary relief given to the foreclosing

lender. The receiver ultimately sold the warehouse in 1979 to parties named JOVANOVIC. The JOVANOVICS, although they did not submit a bid shown in any way to have been based in whole or in part on the value of the partitions, refused to let KOSCOT remove the moveable partitions [at KOSCOT'S expense] and KOSCOT was required to resort to the filing of a diversity action for replevin to recover possession of what it had long considered to have been its personal property.

Jurisdiction of that diversity action, filed under 28 U.S.C. Section 1291, was accepted by the Middle District of Florida. At trial, however, the district court not only heard the

uncontradicted evidence establishing that the subject partitions were personalty, as of installation and initial usage, by the installer, but it erroneously allowed testimony from a series of "Johnny Come Lately's". These were individuals, including the buyer in foreclosure, the receiver and the foreclosure judge [dicta] whose first connection with the property did not even come into play until after the filing of the foreclosure and receivership proceedings in 1978.

Using this entirely incompetent evidence from strangers to the initial installation of the subject partitions, the district court purported to find as

the trier of fact that the original installation made in the early 1970's was an intentional annexation of the partitions to the real property.

The Eleventh Circuit, on appeal from the adverse trial court decision in the diversity action, fell into the same intelluctual "trap" into which the trial court had been led.

Ignoring the fact that the entirety of the evidence from the only competent sources [to-wit the initial installers and initial users] pointed exclusively to a characterization as personalty, the Eleventh Circuit like the trial court found that the trial court's

findings were "amply supported by the record" and were thus to be affirmed. Petitioner submits to this Court, as grounds for accepting jurisdiction, that Petitioner's vested rights to continued ownership of personal property have been abrogated without due process of law. To have allowed the testimony of parties so remote from the initial installation, as here, as the sole, supposed record basis for converting the partitions into realty, deprived KOSCOT of its property which was vested personal property and subject to the continuing protection of the due process clause.

As additional grounds for granting review on certiorari, the

decision of the Eleventh Circuit clearly conflicts with moveable partition decisions of the Eighth and Tenth Circuits.

REASON FOR GRANTING THE WRIT

Three reasons dictate that the writ should be granted in this case:

1. Petitioner's vested rights to personal property have been destroyed.

2. The fact that this has been done in the guise of a judicial proceeding does not excuse it for in the very proceeding in which Petitioner's vested rights were destroyed, Petitioner was denied due process of law.

3. The decision of the Eleventh Circuit in this case is in conflict with

decisions of the Eighth and Tenth Circuit.

VESTED RIGHTS

A "vested right" is one which is absolute, complete and unconditional, to the exercise of which no obstacle exists, and which is immediate and perfect in itself and not dependent upon a contingency. Hutton v. Autoridad Sobre Hogares De La Capital, 78 F. Supp. 988, 994, 999 (D.C.P.R. 1948). It is difficult to define the term "vested right" with exactness. It is not used in any narrow or technical sense or as imparting a power of legal control merely but rather as implying an interest which

is right and equitable that the Government should recognize and protect, and of which the individual could not be deprived without injustice. Keller v. Wilson & Co., 190 A. 115, 122, 21 Del. Ch. 391.

A "vested right" is absolute, complete and unconditional in itself. State ex rel. Wayne County v. Hackmann, 199 S.W. 990, 991, 272 Mo. 600.

A "vested right" is property which law protects and is an immediate vested right of present or future enjoyment. Scamman v. Scamman, Ohio Com. Pl. 90 N.E. 2d 617, 619 (1950). A right, to be "vested" in accurate legal sense,

is complete and consummated and one of which the person to whom it belongs cannot be divested without his consent. Id. at 619. If, in fact, as the uncontradicted evidence here shows, KOSCOT obtained vested rights to personal property in the early 1970's, nothing which a court could later do, based upon testimony of parties remote to the initial creation of the estate, could operate to divest KOSCOT of its valuable property rights.

The distinction between personal property and real property is too fundamental to be overlooked. The situs of personal property, for example, is transitory and follows the legal

residence of the owner. The situs of real property is permanent and is tied to the jurisdiction in which the realty is always found.

Historically, for another example, in almost every state a spouse must joint in a transfer of real property. Personal property may be conveyed readily by the owner of record without any additional joinders and without the substantial formalities that are required in the case of transfer of realty.

A whole plethora of ancillary "rights" follow property, depending upon whether it is real or personal property.

For a federal court to destroy either of those estates, without any competent evidence from any witness in attendance or involved at time of the creation of the initial estate, does violence to the very concept of private property, as a constitutionally-protected vested interest, upon which this country has been operating from inception.

VIOLATION OF DUE PROCESS

This Court held, in Logan v. Zimmerman Brush Co., 455 U.S. 422, at 430 (1982):

> "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause'."

In Anderson Nat. Bank v. Luckett, 321 U.S. 233, 246 (1944) it is posited:

> "What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case."

In Mayberry v. Pennsylvania, 400 U.S. 455, 464-65 (1971), this Court held:

> "Whether the trial be federal or state, the concern of due process is with the fair administration of justice."

Two decisions of this Court deal specifically with the unconstitutional use of evidence as a violation of one's due process rights. In Lisenba v. People of State of California, 314 U.S. 219, 236, it is stated:

"The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." (Emphasis supplied)

The Lisenba rule was adopted and reinforced in Blackburn v. State of Alabama, 361 U.S. 199, 206, in the simple reiteration that the due process clause "...forbids 'fundamental unfairness in the use of evidence whether true or false'".

In relying upon testimony of the receiver; the attorney for the seller conveying the property from the receiver to the buyer in foreclosure, and from the buyer in the foreclosure [as did the trial court and Eleventh Circuit below]

federal courts have here relied upon evidence which, even if tendered in good faith, is constitutionally inadmissible when tested by the historical sanctity of vested property rights.

DECISIONAL CONFLICT

The decision, here sought to be reviewed conflicts with the decision of the Eighth Circuit in Minot Federal Savings & Loan Ass'n. v. United States, 435 F.2d 1368 (8th Cir. 1970) which holds that moveable partitions, as here, which could be arranged as room dividers but which could easily be removed from floor to floor or building to building,

constitute tangible personal property; not structural components of the building.

The decision below likewise conflicts with the decision of the Tenth Circuit in King Radio Corporation, Inc., v. United States, 46 F.2d 1091 (10th Cir. 1973) which similarly held that moveable partition systems, which could be relocated elsewhere on the structure, constitute tangible personal property; not part of the realty.

CONCLUSION

The rights which are of historical significance and which are required to be preserved, by our Constitution, are sometimes so fundamental that they are overlooked.

Petitioner possesses an ancient and venerable right: a vested interest in personal property.

To be sure, this case does not involve the death penalty, the powers of Congress or the authority of state legislatures or state courts. It does deal, however, with a constitutional right which is equally well-founded and

in the course of our judicial evolution is being whittled away.

In the instant case vested rights have been abrogated by judicial fiat. Constitutionally inadmissible evidence has been used to entirely divest a property-owner of his property without due process of law.

The issues in this case are not deep. They are, however, fundamental. Property, as well as liberty, must be protected in a free society.

The conflict in jurisdictions is itself a sufficient, alternative ground for accepting jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served herein have been served this 27th day of November, 1985.

STANLEY JAY BARTEL, P.A.
Attorneys for Petitioner
2150 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
(305) 358-7177

STANLEY JAY BARTEL

Certiorari should be granted in this case.

Respectfully submitted,

STANLEY JAY BARTEL

CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

KOSCOT INTERPLANETARY, INC.

Petitioner,

vs.

BEACHLEY INVESTMENTS, N.V., a corporation, ANDRES JOVANOVIC and ALIDA NINO de JOVANOVIC

Respondents.

Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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STANLEY JAY BARTEL, P.A.
2150 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
(305) 358-7177
November 29, 1985

Counsel for the Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 84-3593
Non-Argument Calendar

KOSCOT INTERPLANETARY, INC.,

Plaintiff-Appellant,

versus

BEACHLEY INVESTMENTS, N.V., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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(September 27, 1985)

Before TJOFLAT, HILL and ANDERSON, Circuit Judges

PER CURIAM:

In this diversity action, appellant appeals from the judgment of the district court which awarded to appellee, the purchaser of real estate in a court-approved foreclosure sale, certain fixtures, i.e., partitions, a generator, dock lights, computer room lights, a pneumatic tube system, and a safe. The dispositive issue on appeal is whether the district court erred in classifying these items as fixtures to the real property.[1] In order to

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1 Appellant argues for the first time on appeal that this transaction should be rescinded because of mistake or lack of mutuality. This court, however, has refused to consider arguments that were not raised in the lower court. See, e.g., Johnson v. Smith, 696 F.2d 1334, 1338 (11th Cir. 1983). Moreover, even if this issue were properly before the court, the district court's conclusion that both parties intended the partitions to be conveyed by the contract is not clearly erroneous.

determine whether a chattel has become a fixture, courts have applied three basic tests: (1) actual annexation to the realty or something appurtenant thereto; (2) appropriateness to the use or purpose of the realty to which it is attached; and (3) the intention of the party making the annexation that it shall be a permanent accession to the freehold. See, e.g., Commercial Finance Co. v. Brooksville Hotel Co., 123 So. 814, 816 (Fla. 1929). Under Florida law, the determination of whether certain property is a fixture is a question of fact, see Corbett v. Appliance Buyers Credit Corp., 172 So.2d 257, 259 (Fla. Dist. Ct. App. 1965), and under Fed. R.Civ.P. 52(a), the trial court's finding can therefore be reversed only if it is clearly erroneous.

We find that the trial court's finding that these items had become fixtures to the realty is amply supported by the record. The judgment of the district court is therefore

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-3593

KOSCOT INTERPLANETARY, INC.,

Plaintiff-Appellant,

versus

BEACHLEY INVESTMENTS, N.V., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING
(October 29, 1985)

BEFORE: TJOFLAT, HILL and ANDERSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant is DENIED.

ENTERED FOR THE COURT:

s/ R. LANIER ANDERSON
United States Circuit Judge

REHG-4
(rev.9/85)

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-3593

Non-Argument Calendar

D.C. Docket No. 81-330

KOSCOT INTERPLANETARY, INC.

Plaintiff-Appellant,

versus

BEACHLEY INVESTMENTS, N.V.,
et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before TJOFLAT, HILL and ANDERSON,
Circuit Judges.

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
F I L E D
NOV. 13, 1985

SPENCER D. MERCER
CLERK

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 27, 1985
For the Court: Spencer D. Mercer, Clerk

By: s/Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: November 13, 1985